Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

No. 77-1139

CARMEN RUTH BURNETT ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Petitioner, Carmen Ruth Burnett, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas entered on September 26, 1977, and the per curiam order of the Supreme Court of Arkansas entered on November 14, 1977, denying petitioner's application for rehearing.

OPINIONS BELOW

The trial court did not issue a formal opinion on petitioner's motion for severance of defendants. Excerpts of the transcript in the Circuit Court of Garland County, Arkansas, including the judge's statements consolidating the defendants for trial on the Court's own motion and the objections thereto noted in the record, are reproduced in Appendix "A" to this Petition.

The opinion of the court below affirming petitioner's convictions is reported in AR Volume 262, ARKANSAS REPORTS, at 235. This opinion is reproduced in Appendix "B" to this Petition.

The per curiam order of the court below denying petitioner's application for rehearing is unreported and is reproduced in Appendix "C" to this Petition.

Petitioner's Motion for Rehearing and Memorandum in Support of Rehearing is reproduced in Appendix "D" to this Petition.

The per curiam order of the Supreme Court of Arkansas granting a stay of the appellate mandate pending disposition of this Petition is reproduced in Appendix "E".

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on September 26, 1977. The per curiam order of the Supreme Court of Arkansas denying petitioner's application for rehearing was entered on November 14, 1977. A stay of execution of judgment pending disposition of this Petition for certiorari was entered by the Arkansas Supreme Court on December 5, 1977.

This petition for certiorari was filed less than ninety days from the date of the denial of petitioner's application for rehearing in the court below. The jurisdiction of this court is invoked under 28 USC §1257(3).

QUESTION PRESENTED

Is the application of Rule 22.1(a) of the Arkansas Rules of Criminal Procedure (1976) violative of the guarantee of a fair trial implicit in the Fourteenth Amendment because

the rule authorizes judicial approval of an unfair trial stemming from joinder of Defendants on the mere ground that the accused has failed to object to the unfairness.

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

Section 1, Amendment 14 to the Constitution of the United States in pertinent part:

> * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 22.1(a) of the Arkansas Rules of Criminal Procedure, (1976):

> RULE 22.1 Timeliness of Motion; Waiver; Double Jeopardy
>
> (a) A defendant's motion for severance of offenses or defendants must be timely made before trial, except that a motion for severance may be made before or at the close of all evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.
>
> * * *

Rule 22.3 of the Arkansas Rules of Criminal Procedure, (1976):

RULE 22.3 Severance of Defendants.

(a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court shall require the prosecuting attorney to elect one (1) of the following courses:

(i) a joint trial at which the statement is not admitted into evidence;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the statement will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of defendants;

(i) if before trial it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of one (1) or more defendants; or

(ii) If during trial, upon consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one (1) or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the

court may order the prosecuting attorney to disclose any statements made by the defendant which he intends to introduce in evidence at the trial.

Rule 23 of Arkansas Rules of Criminal Procedure, (1976):

RULE 23. AUTHORITY OF COURT TO ACT ON OWN MOTION

RULE 23.1 Consolidation; Severance of Defendants and Offenses

(a) The court may order consolidation of two (2) or more charges for trial if the offenses, and the defendants if there are more than one (1), could have been joined in a single indictment or information without prejudice to any defendant's rights to move for severance under preceding provisions.

(b) The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

STATEMENT OF THE CASE

Petitioner, Carmen Ruth Burnett, was convicted of four counts of robbery by use of a firearm in Garland County Circuit Court, Arkansas. Petitioner was charged together with three co-defendants in four separate informations. Each information charged a separate robbery. All defendants were charged with robbery by use of a firearm in each information. The three co-defendants were Samuel Edward David, Noah Wayne Russell, and Robert Lee Russell.

Petitioner was tried by jury on all four counts twice. Co-defendants Robert Lee Russell and Noah Wayne Russell

pleaded guilty soon after their arrests and testified as State's witnesses at both trials. Petitioner was tried alone at her first trial. The first trial resulted in a non-verdict of a six-to-six tie.

In the interim between petitioner's first and second trial, the trial judge acting on the court's own motion consolidated petitioner's case with Samuel David's case. A formal order consolidating the cases for trial was not entered in the record. The reasons given by the trial judge for consolidating the cases were stated in open court.

> "As I recall, the jury reached a non-verdict of six-to-six tie . . . And in the information furnished me, it was a six-to-six hung jury for the reason Mr. David was not a party to the lawsuit and the testimony reflected that, possibly, he should have been during the trial." (T. 254)

Thereafter, counsel for Samuel David, speaking in behalf of both defendants, objected to joinder of the defendants:

> "We, at this time, would object to a joinder of the issue." (T. 255)

to which the trial judge responded:

> "You may object and your objections are noted of record . . ."

A more detailed transcript of this portion of the proceedings is reproduced in Appendix "A" to this Petition.

Petitioner testified in her own behalf at the second trial that she had no knowledge of the robberies. In summary she stated that she was tricked in an affair of the heart

with her co-defendant, Samuel David, and that she became an unwitting victim of his schemes.

On appeal to the Supreme Court of Arkansas, Petitioner argued she was denied a fair trial because of the trial court's refusal to sever defendants. The court below would not entertain petitioner's argument on this point, finding simply that:

> "Burnett failed to move before the trial for severance of defendant . . . Thus the objection is waived. Rules of Criminal Procedure, Rule 22.1(a) (1976)." Appendix "B" to this Petition.

In her application for rehearing, petitioner argued that Rule 22.1(a) of Arkansas Rules of Criminal Procedure denied her the guarantee of a fair trial implicit in the Fourteenth Amendment because application of the Rule in this instance placed the burden on the defendant alone to secure separate trials. See Appendix "D" to this Petition. Petitioner's application for rehearing was denied without opinion. See Appendix "C" to this Petition.

REASONS FOR GRANTING THE WRIT

Petitioner contends she was denied a fair trial because her trial was joined with the trial of a co-defendant, Samuel David. Petitioner contends that her convictions are constitutionally invalid because application of Rule 22.1(a) of the Arkansas Rules of Criminal Procedure, (1976) by the court below under these circumstances lends authority to judicial toleration of an unfair trial on the mere grounds that the accused has failed to object.

If this criminal case had been tried in a federal court, the trial judge would have had a continuing duty at all

stages of the trial to sever the trials of the defendants when prejudice appeared. *Schaffer v. United States,* 362 U.S. 511, 515 (1960), *rehearing denied,* 363 U.S. 858 (1960). In Arkansas no duty is imposed on the trial judge to sever defendants when prejudice appears at trial. The authority of the Arkansas trial judge to sever defendants on the court's own motion is limited by operation of Rule 23 of the Arkansas Rules of Criminal Procedure, (1976) to circumstances arising before trial which are not in issue here. Once trial commences, severance may be granted only on motion of the prosecution or defense pursuant to Rule 22.3. Under Rule 22.1(a) of Arkansas Rules of Criminal Procedure, (1976) an accused may move for severance of defendants either before trial or during trial. A motion for severance by the accused made for the first time at trial must rest on ground of newly discovered evidence. Failure of an accused to object at the times for which provision is made in Rule 22.1(a) forecloses forever the accused's objection to an unfair trial occasioned by consolidation of defendants.

The Fourteenth Amendment imposes upon the states the duty to afford an accused a fair trial. *Ham v. South Carolina,* 409 U.S. 525, 526 (1973). The continuing duty of a federal judge to grant severance when prejudice appears is grounded in an accused's right to a fair trial. *United States v. Crouch,* 528 F.2d 625, 631 (7th Cir. 1976). *United States v. Cervantes,* 466 F.2d 736, 739 (7th Cir. 1972). Insofar as Rule 22.1 places the burden on the defendant alone to secure a separate trial, the Rule deprives petitioner of rights secured to her under the Fourteenth Amendment, when an unfair trial occurs, nevertheless. Judicial approval of an unfair trial merely on grounds that the defendant has failed to object to the unfairness should not be tolerated.

The circumstances in petitioner's case demanded that the trial court afford separate trials. The defenses offered by petitioner and her co-defendant were not merely antagonistic, they were on a collision course. Petitioner, a middle-aged female, was tricked into an affair of the heart by Samuel David and made an unwitting participant in his scheme to rob her friends and neighbors. Petitioner's only effective course for a defense was to place the blame on her co-defendants where it rightfully belonged. The only means by which petitioner could expose the tricks to which she fell victim was to call the trickster himself which she was prohibited from doing. *Griffin v. State of California,* 380 U.S. 609 (1965). *United States v. Housing Federation of America, Inc.,* 176 F.2d 665, 666 (3rd Cir. 1949). In *United States v. Echoles,* 352 F.2d 892 (7th Cir. 1965), a conviction stemming from a joint trial was reversed because, in the words of the Seventh Circuit Court of Appeals:

> "... a fair trial for (the accused) necessitated providing him the *opportunity* of getting (the co-defendants') evidence before the jury regardless of how (the court) might regard the credibility of that witness or the weight of his testimony." (Emphasis supplied). 352 F.2d at 898.

Petitioner was tried by her co-defendants' silence as well as the prosecution. As indicated in the opinion in the Court below, the trial court refused to permit any attention to be drawn to Samuel David's refusal to testify. Petitioner contends that this action by the trial judge foreclosed her right, the exercise of which was compelled unto these facts, to argue to the jury the inferences to be drawn due to the lack of the production of a material witness. Severance to

secure a fair trial is required in this dilemma. *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), *rehearing denied*, 324 F.2d 375 (1963).

CONCLUSION

Petitioner contends that the Fourteenth Amendment imposes upon a state trial judge the continuing duty to secure an accused's right to a fair trial by severing defendants when prejudice appears at trial. Petitioner contends that Rule 22.1(a) of Arkansas Rules of Criminal Procedure, (1976) is an obstacle to the Fourteenth Amendment because the Rule authorizes state approval of unfair trials merely because the accused has failed to object to the unfairness.

Respectfully submitted,

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Attorney for Petitioner

Appendix "A"

TRANSCRIPT OF ARRAIGNMENT

PROCEEDINGS ON MAY 24, 1976

THE COURT: That's the case before Mr. David was joined as a defendant, and testimony in the case would suggest that one or both had participated in these various robberies which are alleged including 75-2. As I recall, the jury reached a non-verdict of a six-to-six tie.

MR. ANDERSON: Yes, Sir.

THE COURT: And in the information furnished me, it was a six-to-six hung jury for the reason Mr. David was not a party to the lawsuit and the testimony reflecting that, possibly, he should have been during that trial.

MR. RIDGEWAY: The court has us at somewhat of a disadvantage in that we were not aware of the information that came in in the trial.

THE COURT: I see. Well, I'm sure that Mr. Anderson can fill you in fully.

MR. RIDGEWAY: I'd rather have the record, Your Honor.

THE COURT: You would? All right. Now, then, under Rule No. 23 of the New Rules of Criminal Procedure, the court on its own motion is going to join for a trial in criminal cases on CR 75-1, 2, 3, and 4.

MR. RIDGEWAY: Your Honor, we, at this time, would object to a joinder of the issue.

THE COURT: You may object and your objections are noted of record, but I am standing squarely on the Rule

23 which permits the court to do it on its own motion for trial. I refer you to the rule, and, also, all of the conversation that goes along with the rule.

Now, gentlemen, these four cases, as far as this court is concerned, are set for trial on July 6. Any questions?

MR. ANDERSON: None at all from the defendant.

MR. RIDGEWAY: Would the court be too upset, Your Honor, if we filed a written motion for a severance?

THE COURT: Well, I don't know that I'd be upset; I could give you a hearing on it almost immediately if that's what you want.

MR. RIDGEWAY: I'll get it done this week.

THE COURT: But I'm letting the record reflect that criminal actions CR 75-1, CR 75-2, CR 75-3, and CR 75-4 are joined, consolidated for trial under Rule 23.

MR. CLARK: Your Honor, might I ask at this time if both the consolidation of the alleged robberies and of the defendants, too?

THE COURT: Absolutely, read the rule and you'll find out what I'm doing.

MR. RIDGEWAY: Would the court show on the docket that we strongly object?

THE COURT: That's right in the record, Mr. Ridgeway.

MR. RIDGEWAY: Along with my objections to them and exceptions saved, Your Honor, is the main thing. (T. 254-256).

CERTIFICATE

I, Ruby M. Duke, Court Reporter for the Eighteenth Judicial Circuit of Arkansas, certify that I recorded all the proceedings in Criminal Cases Nos. 75-1, 2, 3, 4, and 5, State of Arkansas v. Robert Lee and Noah Wayne Russell, Carmen Ruth Burnett, and Samuel Edward David, Jr., before the Honorable Henry M. Britt, Circuit Judge, at Hot Springs, Arkansas from the 24th day of February, 1975 through the 25th day of October, 1976; that said recordings have been reduced to typewritting by me and that the foregoing pages are a true and correct transcript of the testimony and proceedings had in said trial of this case.

WITNESS MY HAND AS SUCH COURT REPORTER this 20th day of December, 1976.

/s/ Ruby M. Duke, Court Reporter

This record on appeal is hereby approved this 20th day of December, 1976.

/s/ Henry M. Britt, Judge
Eighteenth Judicial Circuit
of Arkansas

Appendix "B"

DIVISION 1

SUPREME COURT OF ARKANSAS

CARMEN RUTH BURNETT AND
SAMUEL EDWARD DAVID, JR. ..... *Appellants*

VS. No. CR 77-22

STATE OF ARKANSAS ..... *Appellee*

Opinion Delivered: September 26, 1977

Appeal from Garland Circuit Court

Henry M. Britt, Circuit Judge
Reversed and remanded as to Samuel David, Jr.

Affirmed as to Carmen Ruth Burnett

DARRELL HICKMAN, Associate Justice

Carmen Ruth Burnett and Samuel Edward David, Jr. were convicted in the Garland County Circuit Court of four counts of robbery by use of a firearm. Both received prison sentences.

Their cases were consolidated for trial, and come to us consolidated, although Burnett and David conducted separate trial defenses and appeal separately.

We find no merit to Burnett's appeal, but reverse and remand David's case.

David, who did not testify during the trial, alleges five errors on appeal, only one of which has merit. He moved for a severance of the offenses and a severance of his and Burnett's trial. We find no abuse of discretion in the court

denying these motions. We do not find any error in the court refusing to give an instruction which would have declared Burnett an accomplice to the robberies, because she never admitted her guilt and maintained her innocence throughout the trial. We do, however, agree with David's argument that the court improperly refused to instruct the jury that his failure to take the witness stand could not be used as evidence by the jury in determining his guilt or innocence. It is reversible error for a trial court to refuse to give such a requested instruction. *Cox v. State*, 173 Ark. 1115, 295 S.W. 29 (1927). Therefore, as to David, we reverse. The trial court felt the instruction would simply call attention to David's failure to testify and might harm his cause. The dilemma often created by joint trials cannot be solved by compromising the rights individuals have when afforded a separate trial.

We find no error in Burnett's case. She alleges three errors: The first two deal with the trial court's refusal to grant severed trials on the robbery charges and to sever her trial from David's. Burnett failed to move before the trial for severance of defendants or of offenses. Thus the objection is waived. Rules of Criminal Procedure, Rule 22.1(a) (1976).

The third allegation of error is that the trial court should have granted her motion for a directed verdict because the evidence against her was merely the uncorroborated testimony of accomplices. This argument is without merit. It is true that the uncorroborated testimony of an accomplice will not sustain a conviction. Ark. Stat. Ann. §43-2116 (Repl. 1964); *Henson v. State*, 248 Ark. 992, 455 S.W.2d 101 (1970). However, we find sufficient evidence besides that of the two robbers which connects Burnett with these crimes.

The State's direct evidence against Burnett and David was mainly the testimony of two brothers, Robert Lee Russell and Noah Wayne Russell. The Russell brothers, the nephews of David, pled guilty to the four robberies and were sentenced to prison terms. Both of them have previous felony convictions. Essentially, these brothers testified that they were asked by David to come to Arkansas from California on behalf of a "lady" to rob some people of diamonds and valuables. They claimed that Burnett furnished them a place to stay, vehicles, a gun, identified the victims and told them what valuables the victims possessed. They performed three separate robberies at the residences of the victims, robbing several people. They testified that they turned over to Burnett and David valuables, including several large diamond rings, for which they received money. They claimed they kept some of the valuables.

Burnett's testimony was, of course, in conflict with that of the brothers. She testified that she did not question some of David's, or some of his friends' actions, because she intended to marry David. She had loaned him a large sum of money to help him get a divorce. As to the comings and goings of the Russell brothers, however, she claimed that she did not know them, their business or their intentions. They were simply acquaintances of David.

She admitted that she met the two brothers at the Little Rock Airport with David, took them to her home in Hot Springs and provided them a place to stay. She had known two of the victims for many years and knew they possessed large diamond rings. She admitted she called one of the victims on the phone on the morning of the robbery at David's request. She said she was asked to inquire if the house was for sale. She admitted that she had ordered and paid for airline tickets for the two brothers whom she knew

by other names. She steadfastly denied her guilt or implication in the robberies.

However, there was other evidence that connected Burnett to these robberies. It is undisputed that she pawned an unset diamond of over two carats on the 23rd of December, 1974. The diamond pawned was similar to a diamond claimed to have been stolen from one of the victims on December the 9th.

One of the victims testified that she kept in her possession a gray box, similar to a lockbox, which contained a great deal of money. She stated that only her husband and Burnett knew of the existence of the box. One of the brothers found a box similar to the lockbox in the victim's house and stated, "No, this isn't it; there is nothing in there."

The robbers testified that Burnett furnished them with a .22 calibre Ruger automatic pistol to use in the robberies. Burnett had at one time kept a .22 calibre pistol similar to, if not a Ruger, in her home. At her first trial, which resulted in a mistrial, she denied that she had any gun in her home. She admitted at this trial that she had previously lied about having this gun. Her explanation was that she wanted to protect a friend who loaned her the gun. She stated the gun was discovered missing sometime in December, the year of the robberies.

These and other circumstances connected Burnett to the robberies and we cannot say, after reviewing the record, that the evidence is insufficient to corroborate the testimony of the two accomplices. Therefore, we will affirm her conviction.

Reversed and remanded as to Samuel David, Jr.
Affirmed as to Carmen Ruth Burnett.
We agree: Harris, C.J., and George Rose Smith and Roy, JJ.

Appendix "C"

STATE OF ARKANSAS)
) SCT.
In The Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 3rd day, being the first Monday of October, A.D. 1977, amongst others were the following proceedings, to-wit:

On the 14th day of November, A.D., 1977, a day of said term

CARMEN RUTH BURNETT ..... *Appellant*

vs. No. CR 77-22

STATE OF ARKANSAS ..... *Appellee*

Appeal from Garland Circuit Court

Appellant's petition for rehearing is denied.

IN TESTIMONY, That the above is a true copy of the Per Curiam of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 26th day of January, A.D., 1978.

Jimmy H. Hawkins, Clerk
By: /s/ Dona L. Williams, D.C.

IN TESTIMONY, That the above is a true copy of the opinion of said Supreme Court rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock this 26th day of January, A.D., 1978.

JIMMY H. HAWKINS, Clerk
By: /s/ Dona L. Williams, D.C.

Appendix "D"

IN THE
SUPREME COURT OF ARKANSAS

CARMEN RUTH BURNETT ..... *Appellant*

vs. No. CR 77-22

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
GARLAND COUNTY CIRCUIT COURT

APPELLANT'S PETITION, MEMORANDUM
AND AFFIDAVITS IN SUPPORT OF REHEARING

PETITION FOR REHEARING

The Appellant, Carmen Ruth Burnett, moves the Court to grant a rehearing in this case for the following reasons:

I. The Court erred in its ruling that Petitioner waived her objections to consolidation of her trial with that of Samuel Edward David.

II. Petitioner was denied due process by the failure of the trial court to afford her a separate trial.

Respectfully submitted,
JACK HOLT, JR.
Attorney at Law
1100 North University
Little Rock, Arkansas 72207
Attorney for Appellant

CERTIFICATE

The undersigned, the attorney for petitioner, certifies that he believes there is merit in the petition and that it is not filed for the purpose of delay.

/s/ Jack Holt, Jr.

CERTIFICATE OF SERVICE

I, Jack Holt, Jr., hereby certify that service of the foregoing Petition for Rehearing was made by mailing copies to Bill Clinton, Attorney General, Justice Building, Little Rock, Arkansas 72201 and Walter G. Wright, Prosecuting Attorney, 623 Central Avenue, Hot Springs, Arkansas 71901, attorneys for Appellee, this 19th day of October, 1977.

/s/ Jack Holt, Jr.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

I. THE COURT ERRED IN ITS RULING THAT PETITIONER WAIVED HER OBJECTIONS TO CONSOLIDATION OF HER TRIAL WITH THAT OF SAMUEL EDWARD DAVID.

Petitioner submits that it was factual error to find that she did not timely object to the consolidation of defendants for purposes of trial. Consolidation of defendants was effected at the insistence of the trial court at arraignment on May 24, 1976. Rules of Crim. Proc., Rule 23.1 (1976). The record of the arraignment proceeding clearly reflects that in response to the Court's action a joint objection was made on the record. (T. 255). Mr. Ridgeway, counsel for one of the defendants, but speaking in this instance on behalf of

both defendants, stated "(W)e, at this time, would object to a joinder of the issue." (T. 255). The trial judge responded "... your objections are noted of record." (T. 255). These conversational exchanges were understood by all present to have been on behalf of and of equal application to both defendants. This is confirmed by the attorneys' affidavits appended to this memorandum.

Rule 22.1 does not require that an objection to consolidation be committed to writing. It is a rude surprise for Appellant to learn at this late date that objections previously noted in the record carry no weight on appeal. Surely the Court does not suggest that trial counsel must risk raising the ire of the trial judge by repeating objections to points previously settled on the record. Petitioner submits that this record sufficiently preserved this matter for decision on the merits on appeal.

II. PETITIONER WAS DENIED DUE PROCESS BY THE FAILURE OF THE TRIAL COURT TO AFFORD HER A SEPARATE TRIAL.

Insofar as Rule 22.1 places the burden on the defendant alone to secure separate trials subsequent to consolidation the Rule contravenes due process guarantee. Relief from prejudicial joinder is grounded in the defendant's right to a fair trial secured by the due process guarantees of the Fourteenth Amendment to the United States Constitution and Article 1, §8 of the Arkansas Constitution. Federal enforcement of the right to a fair trial is applicable to the States through the Fourteenth Amendment. The United States Supreme Court has ruled the guarantee of a fair trial means that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does

appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). It is submitted that a circuit court judge in Arkansas has a continuing obligation to grant severance on the court's own motion when prejudice arises adversely affecting a defendant's right to a fair trial.

The circumstances in the instant case demanded that the trial court afford separate trials. The defenses offered were not merely antagonistic, they were on a collision course. Appellant, a middle-aged female, was tricked into an affair of the heart by her codefendant and made an unwitting participant in his unlawful scheme. Appellant's only course for a defense was to place blame on her codefendant where it rightfully belonged. As a result of this conflict, three classic problems were presented, any one of which standing alone mandates that a trial judge order separate trials. Appellant was forced to take the stand to defend herself from two adversaries instead of one. Severance required. *United States v. Valdes*, 262 F. Supp. 474. The only means by which Petitioner could expose the tricks to which she fell victim was to call the trickster himself, which she was prohibited from doing. *Griffin v. State of California*, 380 U.S. 609, 165. Severance required. *United States v. Echeles*, 352 F.2d 892 (1965). Moreover, the trial court's refusal to draw any attention whatsoever to the defendant's refusal to testify foreclosed Appellant's right, the exercise of which was compelled unto these facts, to argue to the jury inferences to be drawn due to the lack of the production of the material witness. Severance required. *DeLuna v. United States*, 308 F.2d 140 (1963). I ALR 3rd 969. 16 Vand. L. Rev., 1243. It is submitted that the opinion of the Arkansas Supreme Court in this case represents complacent tolerance of collective assessment of guilt. Appellant was tried alone on these charges in 1975. The

jury could not reach a decision. Knowing full well that a joint trial would prejudice Appellant's previous course of defense, the trial judge consolidated the case for the express purpose of increasing the chance for conviction. The use of consolidation procedures for the purposes of curtailing defenses should not be condoned. It is the function of the Appellate Court to see that the utilization of pre-trial procedures of both the court and prosecutor protect defendant's rights to a fair trial. In closing, it is respectfully submitted that the muzzling of Appellant's defense occasioned by the trial court's actions as set forth above denied Appellant her right to a fair trial.

Respectfully submitted,

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1100 North University
Suite 116
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Attorney for Appellant

Appendix "A"

STATE OF ARKANSAS)
)SS
COUNTY OF GARLAND)

AFFIDAVIT

I, MARK CLARK, a licensed attorney, practicing law in Hot Springs, Garland County, Arkansas, and licensed to practice before the Arkansas State Supreme Court, do hereby state on oath that I am actively engaged in the practice of law and my office is located in Suite 105 of the Meyer Building, in Hot Springs, Arkansas, and that I was

one of the attorneys for SAMUEL DAVID in a trial in Garland County, Arkansas, and that at an arraignment on May 24, 1976, I, along with ROBERT RIDGEWAY, was representing SAMUEL DAVID in Garland County Criminal Case Nos. CR 75-1, 2, 3, and 4; that on that date, an arraignment was held for my client and CARMEN BURNETT, a codefendant in this matter. That prior to this arraignment beginning, there was an oral conversation between the attorneys for the two defendants, in regard to a severance of these cases. However in open court, during the arraignment, MR. ROBERT RIDGEWAY, my co-counsel in this matter, made the following statement: "Your Honor, we, at this time, would object to a joinder of the issue." It was my understanding and my belief that this objection was made on behalf of both of the defendants, SAMUEL DAVID and CARMEN BURNETT. The above quote can be found at page 255 of the trial transcript, which was prepared for the appeal to the Supreme Court. I think that if that part of the record, in regard to the arraignment, is interpreted it would be clear that a severance by both parties was desired. The above statement was given for the purpose of outlining what I believe to be the intent of the attorneys at the arraignment in regard to the statement having been made about a severance with the attorneys for MR. SAMUEL DAVID and MRS. CARMEN BURNETT, all being present in the court.

Respectfully submitted,

/s/ Mark Clark, Attorney at Law

VERIFICATION

I, MARK CLARK, do hereby state on oath that the above affidavit is true and correct to the best of my knowledge, belief and information.

/s/ Mark Clark

Appendix "B"

STATE OF ARKANSAS)
)SS
COUNTY OF GARLAND)

AFFIDAVIT

I, SAM L. ANDERSON, Attorney at Law, do hereby state on oath that I was the attorney of record for CARMEN BURNETT in Garland County Criminal Case Numbers CR 75-1, 2, 3, and 4, and that on or about May 24, 1976, an arraignment was held in the Garland County Circuit Court for said defendants on these charges. That between the attorneys, MR. ROBERT RIDGEWAY, MARK CLARK, and myself, there had been considerable discussion in regard to a severance of cases of codefendants CARMEN BURNETT and SAMUEL DAVID; that on the morning of said arraignment MR. ROBERT RIDGEWAY made an objection to the court "on its own motion" enjoining the defendants and issues for common trial.

It was my understanding and the intention of representative counsel that this be treated as a joint motion and the response of the court to the effect, "you may object and your objections are noted of record. . . ."

Based on the court's remarks, it was my understanding and impression that this motion would be treated jointly as to both defendants, since the joining of trial SAMUEL DAVID with CARMEN BURNETT would clearly constitute a detriment to my defense of her case.

I am furnishing this affidavit in support of my understanding that MRS. CARMEN BURNETT joined in the

motion for severance and that due process of law required severance.

Respectfully submitted,

/s/ Sam L. Anderson

VERIFICATION

I, SAM L. ANDERSON, do hereby state on oath that the above affidavit is true and correct to the best of my knowledge, belief and information.

/s/ Sam L. Anderson

Subscribed and sworn to before me this 18th day of October, 1977.

/s/ Charlotte Diane Miller

My Commission Expires:
August 5, 1981

Appendix "E"

STATE OF ARKANSAS)
) SCT.
In The Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 3rd day, being the first Monday of October, A.D., 1977, amongst others were the following proceedings, to-wit:

On the 5th day of December, A.D., 1977, a day of said term

CARMEN RUTH BURNETT ..... *Appellant*

VS. No. CR 77-22

STATE OF ARKANSAS ..... *Appellee*

Appeal From
Garland Circuit Court

Petition to stay mandate pending appeal to the United States Supreme Court is granted.

IN TESTIMONY, That the above is a true copy of the Per Curiam of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 26th day of January, A.D., 1978.

JIMMY H. HAWKINS, Clerk

By: /s/ Dona L. Williams, D.C.

Supreme Court, U. S.
FILED
MAR 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1139

Carmen Ruth Burnett ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

BILL CLINTON
Attorney General
State of Arkansas

By: JOSEPH H. PURVIS
Assistant Attorney General

JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

Attorneys for Respondent

Req. No. 77-16188 45 Copies

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-113[illegible]

Carmen Ruth Burnett ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at *Burnett* v. *State*, 262 Ark. 235, ____ S.W. 2d ____ (September 26, 1977).

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether Rule 22.1(a) of the Arkansas Rules of Criminal Procedure violates the guarantee of a fair trial implicit in the

Fourteenth Amendment by providing for waiver of defendant's motion for severance if not timely filed.

ARGUMENT

The petitioner in this case is actually making two alternative contentions. Through her "Statement of the Case" she alleges that the objection to joinder orally offered by her codefendant's attorney, Mr. Ridgeway (T. 255), was made on behalf of both defendants (petitioner's brief, p. 8). On the other hand she alleges that if the motion to sever was not timely made on her behalf, that the constitutional guarantee of a fair trial required the judge to sever on his own motion at trial because of manifest prejudice. Neither of these contentions merit review by this court.

A.

The issue of whether objection to joint trial was timely made has been considered and completely disposed of by the Arkansas Supreme Court. 262 Ark. at 236. But in order that this Court will not be misled by the affidavits attached to petitioner's brief, the record should be reviewed one more time.

The record reflects that the trial court joined the offenses and the defendants on its own motion pursuant to Rule 23 of the Arkansas Rules of Criminal Procedure (set out in petitioner's brief, p. 5). After the court announced this intention, the following discussion took place:

> "THE COURT: Now, gentlemen, these four cases, as far as this court is concerned are set for trial on July 6. Any questions?

> MR. ANDERSON [attorney for Carmen Burnett]: None at all from the defendant.
>
> MR. RIDGEWAY [attorney for Samuel David]: Would the court be too upset, Your Honor, if we filed a written motion for severance?" (T. 255)

A written motion for severance was filed and the first paragraph of that motion read as follows:

> "Comes now the defendant, Samuel Edward David, by and through his attorneys Mark P. Clark and Robert D. Ridgeway, and for his motion for severance of defendants, alleges and states:" (T. 50)

There are no objections on the record made by petitioner's attorney (Mr. Anderson) to the joinder, nor is there any indication that the motion for severance filed by co-defendant Samuel David was on behalf of the petitioner. It was apparent throughout the trial that the two co-defendants were not cooperating with each other on any phase of their defenses. This was put into the record in the following exchange:

> "MR. WRIGHT [Prosecuting Attorney]: Now, whether or not — this is strictly for the benefit of Mr. Anderson and Mr. Ridgeway — we felt like — do either one of you want it pointed out that you are not conducting a joint defense?
>
> MR. ANDERSON: I'm certainly not conducting a joint defense with anybody.
>
> MR. RIDGEWAY: No, we're not conducting any joint defense with anybody either." (T. 1175)

Therefore, notwithstanding the affidavits of Mr. Clark and Mr. Anderson (there is not one from Mr. Ridgeway), it is apparent that there was no motion for severance, timely or otherwise, made on behalf of petitioner either before or during trial.

B.

The petitioner's primary contention concerning the constitutionality of Rule 22.1 of the Arkansas Rules of Criminal Procedure is equally without merit.

The Fourteenth Amendment's requirement of a fair trial does not place a duty on the State or on the trial court to direct the defendant's defense. In the present case ample opportunity was given for petitioner's attorney to object or move for severance on the ground of necessity to call the co-defendant as a witness. There is, however, no indication at any point in the record that petitioner expressed any intention or desire to call the co-defendant as a witness.

The petitioner cites *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965) as providing that defendants should be severed for trial to allow one defendant the opportunity to question the other. However, in that case the conviction was reversed because the court refused to sever after the filing of a timely motion by the defendant with the grounds, including necessity to call a co-defendant, listed in the motion. 352 F. 2d at 897.

It is easy for a defendant who has gone to trial and lost to examine his case with perfect hindsight and see a more probably successful defense. However, it is not the duty of a trial court to attempt to lead the defendant to this defense. This Court has so ruled in a case with a similar issue. In *Logan* v.

United States, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892) the Court held:

> "Having gone to trial, without objection, on the indictment as consolidated under the last order of the court, it was not open to take the objection for the first time after the verdict." 144 U.S. at 297

Similarly in *Bucklin* v. *United States*, 159 U.S. 682, 16 S. Ct. 182, 40 L. Ed. 305 (1895) the Court held:

> "But as it does not appear that the plaintiff in error objected at the time to being tried by the same jury with the other parties indicted, nor that he excepted to the order of consolidation, we need not consider whether that order, if objected to seasonably, could have been properly made." 159 U.S. at 685

If petitioner's reasoning were followed, trial courts would be under a continuing duty not only to maintain a fair trial which follows acceptable due process standards, but to also seek the most effective course for a defendant to pursue. Under such reasoning a trial court would commit error *unless* it interfered with the tactics of defense attorney wherever another line of defense could conceivably be more successful.

In *United States* v. *Infusino*, 130 F. 2d 561 (7th Cir. 1942), the defendant alleged that the court had committed error by not severing his trial from that of his co-defendants. The Seventh Circuit Court noted that in that case, as in the present case, the defendant did not avail himself of the opportunity to object to consolidation either before or during trial. The court continued:

"It was the duty of the defendant to challenge the court's attention to the procedure if it was wrong, and procure the court's ruling thereon before he could complain of error. *Until that time, the court had had no chance to commit error.* The objection cannot be presented here for the first time." (emphasis added) 130 F. 2d at 562.

Therefore, due process and the requirement of a fair trial does not compel a trial court to do that which he has not been asked to do. Prejudice must be actual and manifest to compel action by this court; the mere fact of a greater chance for acquittal is not of itself adequate grounds for severance. *United States* v. *Rosa*, 404 F. Supp. 602 (W.D. Pa. 1975); *United States* v. *Guy*, 456 F. 2d 1157 (8th Cir. 1972), cert. den. 409 U.S. 896, 93 S. Ct. 136, 34 L. Ed. 2d 153.

CONCLUSION

This Court should deny the petitioner's application for a Writ of Certiorari where the specifics of the argument, the circumstances, and the law deny its efficacy as a claim of merit or demanding of this Court's review.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas

By: JOSEPH H. PURVIS
Assistant Attorney General

JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

Attorneys for Respondent